Supreme Court, U.S.
FILED

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No.

In the United States Supreme Court

OCTOBER TERM, 1997

NATHANIEL SHAFER, M.D.,

Petitioner,

-v.-

THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's rights to due process of law and equal protection of law under the Fourteenth Amendment of the United States Constitution were violated when the Court below held that it was proper to have removed and replaced two of the three panel members of the disciplinary panel who heard the complaint against the Petitioner, notwithstanding the clear wording of §230(10)(f) of the Public Health Law which forbids the replacement of more than one panel member of such a disciplinary hearing panel?

2. Whether the Petitioner's rights to due process of law and equal protection of law were violated by virtue of the fact that the Court below held that notwithstanding §6510 of the State Education Law and §230(10)(d) of the Public Health Law which requires that fifteen days notice must be given to a Doctor in connection with disciplinary charges, that it was nonetheless perfectly alright that less than fifteen days notice of such amended charges were given to Dr. Shafer herein despite the clear language of these statutes?

3. Whether the rights of the Petitioner herein were violated by virtue of the fact that more than four and a quarter years of unexplained delay occurred between the incident giving rise to the disciplinary charges herein and the filing and notifying of the Petitioner herein of such charges, during which hiatus the Petitioner lost contact with essential witnesses, documents and files had disappeared and memories had grown dim, all to the prejudice of the Petitioner?

4. Whether in view of the fact that this Court held in the case of *In Re Ruffolo,* 390 US 544, 88 S.Ct. 1222, reh denied

391 US 961, that disciplinary proceedings such as those herein are "quasi-criminal in nature", were the rights of Petitioner violated by the unexplained hiatus of four and a quarter years which occurred between the incident that allegedly gave rise to the complaint and the notification of the Petitioner of such complaint by filing charges, a violation of the due process and Sixth Amendment rights of the Petitioner to speedy justice?

5. Since only one member of the three member disciplinary panel which were the fact finders on Petitioner's case actually heard all of the evidence and saw the only witness who testified against Shafer, Nurse Graham, and in view of the fact that the panel that was sitting at the time Nurse Graham testified, even went into executive session during which time no minutes were taken at all, and in further view of the fact that two of the three panel members that heard Nurse Graham were removed and replaced by two new members later on in the proceedings, whether the Petitioner's rights to a fair hearing were violated under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, since the panel members constituted what is tantamount to a "jury" and no juror can be replaced at a "trial" unless he or she actually saw and heard all of the evidence and witnesses?

6. Whether the refusal of the administrative law judge to enforce "so ordered" subpoenae served by Petitioner upon the OPMC thus preventing him from obtaining essential evidence for his defense, violated his Fourteenth Amendment's due process and equal protection rights?

THE PARTIES

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JURISDICTIONAL STATEMENT FOR THIS COURT

Jurisdiction for this Court is predicated upon issues affecting the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

A petition for rehearing was made to the Appellate Division of the Supreme Court, the State of New York, Third Department and was denied on May 28, 1998.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

1. United States Constitution, Fourteenth Amendment, due process and equal protection clauses thereof.

2. Section 230(10)(d) of the Public Health Law of the State of New York.

3. Section 230(10)(f) of the Public Health Law of the State of New York.

4. Section 6510(d) of the State Education Law of the State of New York.

OPINIONS BELOW

The opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, the decisions of Mr. Justice Francis Pecora of the Supreme Court of the State of New York, County of New York, the decision of the Board of Regents of the State of New York and the memorandum decisions of the New York Supreme Court, Appellate Division, Third Judicial Department, denying leave to appeal to the Court of Appeals and denying a rehearing are also included in the appendix of this petition.

No.

In the United States Supreme Court

OCTOBER TERM, 1997

NATHANIEL SHAFER, M.D.,

Petitioner,

-v.-

THE BOARD OF REGENTS
OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, Nathaniel Shafer, M.D., has petitioned this Court to review the determination of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, which Court had affirmed the determination of the Board of Regents of the State of New York, which had sustained, in turn, the determination of the Office of Professional Medical Conduct (OPMC) only in part, to the extent that the Petitioner was not suspended from practice,

was not put on probation but was fined $10,000 for an alleged dereliction in his record keeping.

The care and treatment of patients was not involved, since there was no allegation that any patient suffered from lack of proper care or treatment.

The Board of Regents in essence found that the Petitioner had failed to "maintain records that accurately reflect the evaluation and treatment of Patients "A" and "B" in that the progress notes of these patients are almost identical and do not accurately reflect the condition of those patients on January 21, 22, 23, and 24, 1983; and the Respondent [Petitioner] is not guilty of the remaining specifications and charges."

The reason we are petitioning this Court is because we maintain that the Petitioner's rights under the Fourteenth Amendment of the United States Constitution concerning due process of law and equal protection of laws was violated by the determination of the Respondent and the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

We base that upon the fact that the charges against the Petitioner, at the time of the filing of the Article 78 Proceeding in the Appellate Division, Third Judicial Department were about fourteen years old and that for over four and a quarter years following the alleged misconduct on the part of the Petitioner herein, he was kept in the dark and was completely unaware that any investigation of his conduct was being conducted. He was totally ignorant of those charges until the charges were finally served upon him after over four and a quarter years following their alleged commission.

It is extremely significant that no suggestion was ever made that any patient had ever received improper care and attention!

The Petitioner has been a well respected medical doctor practicing in the State of New York for over four decades. His credentials are impeccable. No complaint against him was ever filed before or after the instant one.

In addition to the unusual and we believe unconstitutional delay in bringing the charges against him, the Petitioner was also denied equal protection of the laws because of the fact that pursuant to §230(10)(f) of the Public Health Law of the State of New York, Shafer was denied a panel hearing before the OPMC, which should have consisted of three members but in essence turned out to be only one member.

The reason we say that, is that the original three member panel, was disbanded when two of its members, for whatever reason, left and no longer served as part of the hearing panel. Before they left however, the only substantive witness against Dr. Shafer, Nurse Graham, had testified and the panel at that time had gone into executive session where no minutes were taken.

Subsequent to that two new panels were added to make the panel of three, but they could only read the minutes that were available.

The statute however, namely §230(10)(f) of the Public Health Law specifically declares that only one member of a panel, hearing a disciplinary proceeding against a doctor can be substituted. In this case two members of the hearing panel were substituted over the objections of the Petitioner.

Furthermore, the Petitioner maintains that his rights were further violated in contradiction of the Fourteenth Amendment of the United States Constitution because §6510 of the State Education Law of the State of New York was violated when amended charges against him were served upon him during the progress of the hearing, without giving him the statutorily mandated fifteen days notice. To this the Petitioner also objected.

The record shows Petitioner was allowed only about five minutes to review the amended charges and presumably the panel of the OPMC conducting the hearing had about the same time to review them.

Furthermore, to exacerbate the situation, the administrative law judge who presided at the hearing before the OPMC refused to enforce subpoenae signed by him and served upon the OPMC which refused to produce certain important records. The administrative law judge refused to in anyway enforce those subpoenae. Yet the administrative law judge insisted that the Petitioner proceed with the hearing.

In this context, a hearing and hearings were conducted on May 14, June 4, and August 10, 1987.

From that point, this matter was brought before Justice Pecora of the Supreme Court, New York County, as a result of Court-ordered stays involving an Article 78 petition on August 17, 1987, the first of several motions addressed to the Petitioner's desire to obtain various records including the Petitioner's personnel file pursuant to the Administrative Judge's subpoenae. His decision and opinion as a matter of fact, impelled Justice Pecora to characterize what followed "as games of 'cat and mouse' where in the records ordered to be supplied were in effect, were only partially supplied." On February 21, 1990, Supreme Court of the State of New York

ordered and directed, that its orders were to be complied with immediately.

Again the OPMC was instructed and directed to turn over to Petitioner's attorney and documents, minutes, and/or memoranda which would aid the Petitioner in his defense.

Instead of complying, John J. O' Grady from the Attorney General's office sent a letter to Justice Pecora declaring:

> Since the Health Department has rested its direct case on August 10, 1987, Dr. Doe [Shafer] has complete discovery of all the evidence and all the testimony against him. He needs no Bill of Particulars. He has the Health Department's entire case. Your [Justice Pecora] direction for a Bill of Particulars is unnecessary...there is nothing further for the Health Department to do to comply with your order.

The foregoing therefore indicates that the Office of Professional Medical Conduct and the Attorney General of the State of New York, speaking on its behalf, *assured Justice Pecora that the case against Dr. Shafer had been concluded.*

The audacity of Mr. O' Grady's statement can be characterized only as contemptuous since the statements are untrue and in result declined to follow and obey the orders of Justice Pecora requiring them to provide a Bill of Particulars.

As a matter of fact it was the OPMC which invited Justice Pecora to review the minutes it supplied to him of the hearing on the grounds that the case had been completed so far as they were concerned and based upon that completed case, *Justice*

Pecora issued his scathing decision and opinion dismissing the charges in toto against Dr. Shafer.

We also ask this Court to note that the Administrative Law Judge presiding at the hearing before the panel which was trying Dr. Shafer, in many cases totally ignored the OPMC's disobedience of orders of the Administrative Judge and in many cases the OPMC refused to obey his subpoenae. We maintain this was a denial of due process of law.

Added to this was the fact that the charges were amended two days before the commencement of the hearing which rendered it jurisdictionally improper and was both unconstitutional and a mockery of justice. Twenty days notice of charges is mandatory before any hearing can be commenced and this therefore denied Petitioner his rights to a fair hearing. (See, §230(10)(d) of the Public Health Law, and §6510(d) of the State Education Law).

To exacerbate the denial of due process and a fair hearing, we ask this Court to note the Administrative Judge presiding at the hearing of Dr. Shafer refused to even impose any sanctions on the OPMC for ignoring or disobeying the subpoenae, and his orders.

For the convenience and assistance of this Court, we have annexed an appendix which includes the decision and opinion of Honorable Francis Pecora, Justice of the Supreme Court, New York County, who had dismissed the complaint and proceedings against Dr. Shafer, but because of jurisdictional questions the Appellate Division, First Department remanded the matter on the grounds the hearing was incomplete. The opinion however, of Justice Pecora we believe is of substantial significance and may be of help to this tribunal.

We might also point out from the stand point of denial of a fair hearing and of due process of law on the part of the OPMC that during the hearings and before any determination had been made as a result of those hearings, the OPMC disseminated scurrilous and inaccurate information to the media indicating that Dr. Shafer had been guilty of professional misconduct whereas in truth no determination had been made because the hearings were still *in esse*. As part of the addendum in the lower court we annexed a headline that appeared in the New York Daily News that was extremely hurtful to Dr. Shafer's practice and constituted further denial of due process of law under the circumstances. We of course are also annexing a copy of the Appellate Division First Department determination that it could not exercise jurisdiction because the hearing had not concluded. The foregoing exhibits, namely the decision of the Appellate Division First Department and the outrageous publicity disseminated by the Office of Professional Medical Conduct are all taken form the record on appeal that was submitted by the OPMC and the Attorney General to the Appellate Division First Department.

POINT I

THE SOLE SUBSTANTIVE WITNESS AGAINST THE PETITIONER AT HIS DISCIPLINARY HEARING WAS NURSE CATHERINE GRAHAM. THERE WERE APPARENTLY SOME DISPUTES BETWEEN DR. SHAFER AND NURSE GRAHAM. PATIENT CARE AND TREATMENT WERE NOT INVOLVED. ONLY ONE MEMBER OF THE DISCIPLINARY PANEL THAT FINALLY RENDERED A DECISION IN THIS CASE ACTUALLY HEARD NURSE GRAHAM. THE TWO OTHER SUBSTITUTE MEMBERS NEVER SAW OR HEARD HER AND INDEED COULD NOT EVEN REVIEW EVERYTHING THAT OCCURRED DURING THAT PERIOD OF TIME BECAUSE OF THE FACT THAT THE THEN EXISTING PANEL WENT INTO EXECUTIVE SESSION WHERE NO MINUTES WERE TAKEN. SOME OF THE MINUTES WHERE NURSE GRAHAM TESTIFIED WERE AVAILABLE FOR REVIEW BUT OF COURSE INFLECTIONS, THE COUNTENANCE OF THE WITNESS AND SO FORTH COULD NOT BE REVIEWED. THE MATTER WAS THEN REFERRED ON A PETITION TO SUPREME COURT JUSTICE, NEW YORK COUNTY, FRANCIS PECORA WHO WAS TOTALLY SHOCKED AND NONPLUSED BY WHAT HAD OCCURRED. ALL THE MINUTES THAT EXISTED AT THAT TIME WERE TURNED OVER TO JUSTICE PECORA BECAUSE OF THE FACT THAT THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT (OPMC) STATED THAT THEIR CASE WAS OVER AND HAD BEEN FULLY PRESENTED.

Justice Pecora after carefully reviewing the entire record that existed at that time, and noting the over four and one quarter years that had elapsed between the alleged commission of the violation and the notification of the Petitioner that a complaint had been lodged was otherwise so shocked by the inadequacy and unfairness of the proceedings that *he dismissed the complaint inter alia:*

> The purported case against Petitioner is based on innuendo, improper opinion evidence, improper expert opinion based upon supposition, and not on the facts and evidence, improper curtailment of cross examination, improper admission and/or exclusion of evidence or rulings which were incomprehensible to this Court. In short there was no actual proof of any wrongdoing by the Petitioner.

The Court of Appeals in the case of *People v. Prosser*, 309 N.Y. 353, 130 N.E.2d 891 (1955), made it abundantly clear that inordinate delay [laches] depriving a Defendant of his statutory right to speedy justice depends upon circumstances of each particular case. The Court of Appeals added, however, *the burden is on the state and not on the Defendant*, to see that he is brought to trial and his mere failure to take action cannot be treated as a waiver of a statutory right to speedy justice.

We would point out that the Petitioner is not the one who caused the delay here. His frustration in not getting the items which were ordered and subpoenaed did not contribute to delay because of the fact it constituted a contempt of Court committed by the OPMC in refusing to obey these subpoenae and these orders.

Furthermore, keeping the Petitioner in the dark completely for 4 1/4 years after the incidents despite the fact that the investigation commenced in 1983, was unconscionable and unconstitutional particularly since Dr. Shafer was not notified until 1987 of the existence of the complaints.

The time for action on the part of the OPMC began when the incidents occurred, not four years later. (See *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303 (1975).

Furthermore, where there has been a denial of speedy justice, the Supreme Court of the United States has held that dismissal is the only remedy under those circumstances (*Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260 (1973).

While prejudice has clearly been shown in this case, we should point out that prejudice to the Petitioner is only one factor and is not necessarily the only factor (*Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973). See also, *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992).

In *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988 (1967), the speedy trial requirement of the United States Constitution is binding upon the state.

In 1844, an English Judge dealing with a problem similar to that presented herein but involving less delay, opined very aptly (*Regina v. Robbins*, 1 Cox C.C. 114):

> I ought not to allow the case to go further. It is monstrous to put a man on trial after such a lapse of time. How can he account for his conduct so far back?...If the charge be not preferred for a year or more, how can he clear

> himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

See 5 Stan. L.Rev 95, 104, (1952) "Justice overdue-speedy trial for the pre-trial Defendant."

In *Mann v. United States*, 304 F.2d 394, 396, 397 (D.C. Cir. 1962), the Court of Appeals similarly noted:

> Indeed, a suspect may be at a special disadvantage when complaint or indictment or arrest, is purposefully delayed. With no knowledge that the criminal charges are to be brought against them. An innocent man has no reason to fix in his memory the happenings on the day of the alleged crime.

Moreover, there is no way a suspect can compel or insist that the government commence a prosecution; nor can a Defendant determine when or if the government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In *Pollard v. United States*, 352 U.S. 354, 361-62 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted *United States v. Provoo*, 350 U.S. 857 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from *Pollard v. United States*, supra, 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. [See *Mann v. United States*, supra, 304 F.2d at 396-397, n. 4; *Taylor v. United*

States, 238 F.2d 259 (D.C. Cir. 1956); *Nickens v. United States*, 323 F.2d 807 (D.C. Cir. 1963); *United States v. Provoo*, supra.] See 18 U.S.C. §3282. This is a quasi-criminal case. (See *In Re Ruffalo, supra*, 390 U.S. 544).

This Court has plenary power to review the actions below.

In *United States v. Lustman*, 258 F.2d 476, that Court considered the affect of a very prolonged delay from the point of view whether "prejudice" need be shown. At 258 F.2d 477, 478, that Court declared:

> ...A showing of prejudice is not required when a criminal defendant is asserting a constitutional right.
>
> [Citing cases]. Continuing that Court explained:
>
> Thus we assume that the un-excused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though Appellant has not shown that it prejudiced him in the prosecution of this defense.

Of course, herein there was great prejudice.

POINT II

A DISCIPLINARY PROCEEDING SUCH AS THE ONE AT BAR IS A "QUASI-CRIMINAL PROCEDURE" AND IT IS THEREFORE COMPARABLE TO A CRIMINAL RATHER THAN CIVIL PROCEEDING. THE HEARING BEFORE THE ADMINISTRATIVE JUDGE WHO REFUSED TO ENFORCE THE SUBPOENAE THAT HE HAD "SO-ORDERED" AND THE FAILURE TO GRANT THE STATUTORY 15 OR 20 DAY NOTICE OF HEARING, COUPLED WITH THE FAILURE TO SUPPLY NEEDED MATERIAL FOR THE DEFENSE VIOLATED STATE AS WELL AS FEDERALLY PROTECTED RIGHTS. THIS, COUPLED WITH THE 4 1/4 YEARS UN-EXCUSED DELAY ON BRINGING CHARGES, VIOLATED DR. SHAFER'S DUE PROCESS RIGHTS. JUSTICE PECORA'S DETERMINATION TO DISMISS THE CASE ALTOGETHER, WE SUBMIT, WAS SOUND.

A disciplinary proceeding, whether it involves lawyers or doctors, is similar and the laws pertaining thereto are similar. The rights which devolve upon a person who becomes a subject of a disciplinary proceeding must be scrupulously protected.

A determination of suspension or disbarment form practice, capable of destroying a physician's reputation and livelihood is a devastating sanction. For this reason the Supreme Court of the United States has characterized this type of proceeding as being "of a quasi-criminal nature". (See, *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, reh. denied 391 U.S. 961, 88 S.Ct. 1833 (1968).

> [I]n our Country *a court's disciplinary proceeding against a member of its bar [physician] is comparable to criminal rather than a civil proceeding*...[I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See *Bradley v. Fisher*, 80 U.S. [13 Wall.] 335, 355, 20 L.Ed. 646 (1872); *Spevack v. Klein*, 385 U.S. 511, 516, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions... (Emphasis is supplied.)

When an individual is faced with a criminal prosecution, strict adherence to the full panoply of due process protection is guaranteed. U.S. Const. Amends VI, XIV. In other situations, the importance of the right as well as the need of the state for summary procedures to carry out particular public policies have been balanced in determining which procedural protection must apply. See, *e.g.*, *Gross v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (suspension of students); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (suspension of driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (termination of relief payment); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 S.Ct. 175, 1179-

1180, 19 L.Ed.2d 224 (1963) (exclusion from bar); *Joint Anti-Fascist Comm. V. McGrath*, 341 U.S. 123, 71 S.Ct. 95 L.Ed. 817 (1951) (listing of "subversive organization").

In *Johnson v. Avery*, 393 U.S. 483, 490 n.11, 89 S.Ct. 747, 751 n. 11 (1969) the Supreme Court of the United States cautioned:

> The power of the States to control the practice of law [medicine] cannot be exercised so as to abrogate federally protected rights.

See also, *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856); *In Re Fisher*, 179 F.2d 361, 369 (7th Cir. 1950) cert. denied, sub. nom *Kerner v. Fisher*, 340 U.S. 825, 71 S.Ct. 59 (1950).

Justice Pecora found that the Petitioner was denied even the fundamental right to have his subpoenae enforced, and because of the delay involved, could not even find the patients, secretary or other witnesses, with few exceptions, that he had a right to confront and/or cross examine. Thus for all intents and purposes, the Petitioner really had only an illusionary opportunity to be heard. He did not know most of the evidence upon which the complaint was based; he could not examine the patients who were allegedly involved; he could not find his secretary who he then employed four and one half years earlier and a fair amount of "evidence" had been lost or destroyed by the OPMC. On top of that, the OPMC refused to turn over subpoenaed material despite the Administrative Judge's "so-ordered" endorsements. They only gave him two days' notice of amended charges and directed that he proceed with only five minutes of preparation, and in essence the hearing was a mockery of justice.

"The fundamental requisite of due process is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Particularly when a person's good name, integrity, reputation or honor is at stake because of government action, a full and fair hearing should include, at the very least, notice of the charges or complaint, disclosure of the evidence supporting the charges, and an opportunity to be heard and to confront and cross examine witnesses. See, e.g. *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972); *Wisconsin v. Constantinuau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963); *Greene v. McElroy*, 360 U.S. 474, 492, 496- 97, 79 S.Ct. 1400, 1411, 1413, 3 L.Ed.2d 1377 (1959).

It follows that in any disciplinary proceeding, due process requires a reasonable opportunity to present a defense to the trier. See, e.g. *In Re Ruffolo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117, reh. denied, 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874 (1967); *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973); *In Re Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954). *The hearing "must be granted....in a meaningful manner." Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2 62 (1965).

In the foregoing it is therefore obvious that the full panoply of constitutional rights that appertain to even criminal proceedings had to be provided to the Petitioner herein by the administrative judge but were not.*

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* See Appendix C to this Petition, Justice Pecora's opinion dismissing the charges against Petitioner.

POINT III

WE HAVE ALREADY ADVERTED CONCISELY IN THE FOREGOING PASSAGES OF THIS BRIEF THAT JURISDICTIONALLY THE PROCEEDINGS AGAINST DR. SHAFER ARE SERIOUSLY FLAWED IN BLATANT VIOLATION OF THE RULES AND STATUTES PERTAINING TO HEARINGS BEFORE THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT BY VIRTUE OF THE FACT THAT *TWO* OF ONLY THREE MEMBERS OF THE HEARING PANEL WERE REPLACED DURING THE PROCEEDINGS, OVER OBJECTION OF THE PETITIONER, IN VIOLATION OF SECTION 230(10)(f) OF THE PUBLIC HEALTH LAW. FURTHERMORE, THE JURISDICTIONAL ASPECTS OF THIS CASE WERE ALSO VIOLATED BY VIRTUE OF THE FACT THAT IN VIOLATION SECTION 6510(d) OF THE STATE EDUCATION LAW AND SECTION 230(10)(d) OF THE PUBLIC HEALTH LAW LESS THAN 15 DAYS NOTICE WAS GIVEN TO THE PETITIONER WHEN AMENDED CHARGES WERE SERVED UPON HIM DURING THE PROGRESS OF THE HEARING. THIS WAS ALSO OVER OBJECTION OF THE PETITIONER. ACCORDINGLY WE MAINTAIN THAT EVEN JURISDICTIONALLY, THE PROCEEDINGS WERE IN VIOLATION OF STATUTES, RULES AND WHAT WE PERCEIVED AS DUE PROCESS OF LAW.

We have already set forth the fact that pursuant to statute, namely Section 230(10)(f) of the Public Health Law, during the progress of this kind of disciplinary hearing of a physician, only *one* member of a panel can be replaced over

the objection of the Petitioner in the event of death or other incapacity. The panel consisted of only three (3) members.

In the case at bar, however, over objection of the Petitioner, *two* members of the panel were replaced and consequently we maintain that this deprived the hearing panel of jurisdiction.

This was most important because of the fact that the only substantive witness for the OPMC was Nurse Catherine Graham, who testified early in these proceedings, albeit several years after the incidents about which she testified having occurred.

Since two members of the hearing panel that finally decided this case had been replaced over objection of the Petitioner, we maintain that this was a clear violation of the Public Health Law, which we just cited, and violated equal protection under the Fourteenth Amendment.

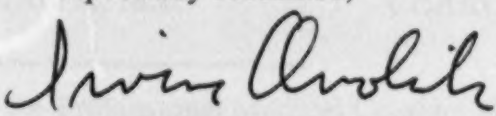
In addition to the foregoing, the Petitioner was served with amended charges during the progress of the hearing, a fact to which we have already adverted early in this brief with less than statutorily required 15 days of notification. This violated §230(10)(d) of the Public Health Law, and §6510(d) of the State Education Law, which requires at least 15 days before any notice charges can be preferred against a physician. Thus we maintain that the OPMC never obtained proper jurisdiction over this case. This also violated the Fourteenth Amendment.

CONCLUSION

The petition should be granted and the charges against the Petitioner should be dismissed.

Dated: New York, New York
August 20, 1998

Respectfully submitted,



IRVING ANOLIK
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225 Broadway—Suite 1902
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(212) 732-3050
Counsel of Record and
A Member of The Bar
Of This Court

APPENDIX A

Statement of Charges Dated March 27, 1987

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL
MEDICAL CONDUCT

IN THE MATTER OF NATHANIEL SHAFER, M.D.	STATEMENT OF CHARGES

The State Board for Professional Medical Conduct alleges as follows:

1. NATHANIEL SHAFER, M.D., hereinafter referred to as the Respondent, was authorized to engage in the practice of medicine in the State of New York on August 31, 1955 by the issuance of license number 076953 by the State Education Department.

2. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988 at 10 East 58th Street, New York, New York 10028.

3. Respondent is charged with professional misconduct within the purview of N.Y. Educ. Law §6509 (McKinney 1985) as set forth in the specifications.

FIRST SPECIFICATION

4. Respondent is charged with professional misconduct by permitting, aiding or abetting an unlicensed person to

perform activities requiring a license within the meaning of N.Y. Educ. Law §6509(7) (McKinney 1985), in that:

(i) Respondent, with his full knowledge and consent, permitted and allowed an unlicensed person to assess Patient A (patients denominated alphabetically are identified in Appendix A) and to write progress notes on the patient's hospital chart, for the following dates: January 20, 21, 22, 23, and 24, 1983, while Patient A was hospitalized at St. Clare's Hospital and Health Center, New York, New York.

(ii) Respondent, with his full knowledge and consent allowed an unlicensed person to assess Patient B and to write progress notes on the patients's [sic] hospital chart, for the following dates: January 20, 21, 22, 23, and 24, 1983, while Patient B was hospitalized at St. Clare's Hospital and Health Center, New York, New York.

(iii) Respondent, with his full knowledge and consent allowed an unlicensed person to assess Patient C and to write progress notes on the patient's hospital chart, for the following dates: January 23 through January 26, 1983, while Patient C was hospitalized at St. Clare's Hospital and Health Center, New York, New York.

SECOND SPECIFICATION

5. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) in that he committed unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.1(b)(10) in that Respondent delegated professional responsibilities to a person when the Respondent knew or had reason to know that such person was

not qualified by training, by experience or by licensure, to perform them, specifically:

Petitioner repeats each allegation of the First Specification as set forth in paragraph 4(i), (ii), and (iii) of this Statement of Charges.

THIRD SPECIFICATION

6. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(2) (McKinney 1985) in that he practiced the profession fraudulently, specifically:

(i) Respondent made and/or caused to be made entries in the hospital records of St. Clare's Hospital and Health Center which falsely represented the dates of the visits and/or the patient's condition and/or the examination performed and/or by whom the examinations were performed for patient A through F.

FOURTH SPECIFICATION

7. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) in that he committed unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.2(a)(3) in that he failed to maintain records which accurately reflect the evaluation and treatment of patients A through F.

DATED: Albany, New York
March 27, 1987

KATHLEEN M. TANNER
Director
Office of Professional
Medical Conduct

APPENDIX B

Amended Statement of Charges
Dated May 12, 1987

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL
MEDICAL CONDUCT

IN THE MATTER	AMENDED
OF	STATEMENT
NATHANIEL SHAFER, M.D.	OF
	CHARGES

The State Board for Professional Medical Conduct alleges as follows:

1. The State Board for Professional Medical Conduct repeats and realleges each allegation contained within the Statement of Charges dated March 27, 1987 and served on Respondent Nathaniel Shafer, M.D. on April 22, 1987.

2. The State Board for Professional Medical Conduct amends the Third Specification of the Statement of Charges, paragraph six, to include the following:

(ii) Respondent submitted a bill for services purportedly rendered to Patient A, to the medical benefits carrier for said patient which bill falsely represented that Respondent had conducted ten follow-up hospital visits for Patient A at St. Clare's Hospital and Health Center between January 21, 1983 and January 30, 1983.

DATED: Albany, New York
May 12, 1987

/s/
KATHLEEN M. TANNER
Director
Office of Professional
Medical Conduct

APPENDIX C

Memorandum Decision of the Supreme Court of the State of New York, County of New York, (Justice Francis N. Pecora) Dated January 29, 1992

SUPREME COURT, NEW YORK COUNTY
IAS PART 52

JOHN DOE, M.D.,

Petitioner,

-against-

Index No.
19953/87

ST. CLARE'S HOSPITAL AND HEALTH CENTER and THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT,

Respondents.

FRANCIS N. PECORA, J.:

The petitioner, a physician, moves for dismissal of the complaint brought by the Office of Professional Medical Conduct (hereinafter "OPMC") and/or to prohibit further prosecution of the complaint on several grounds, some of which will hereinafter be addressed.

The relevant facts are as follows: the petitioner, a Board Certified Internist, is a physician licensed to practice in the State of New York since 1955. He became associated with St. Clare's Hospital in New York City in 1982.

In the month of January, 1983, several alleged problems presented themselves regarding the manner in which entries were being made in the records of several patients at St.

Clare's H[o]spital, apparently in violation of hospital regulations. An internal investigation was commenced by various persons and committees within the hospital, without notice to the petitioner until some time after all the patients whose records were involved, had been released from the hospital.

In May, 1983, petitioner resigned his privileges at the hospital.

On April 22, 1987, a period of four (4) years and three (3) months from the time of the alleged acts of misconduct, petitioner was served with a Notice of Hearing to be conducted by the aforesaid OPMC on May 14, 1987. Attached to the notice was a Statement of Charges containing four (4) specifications. It is alleged that during this period in excess of four (4) years, petitioner, unaware that a complaint had been lodged against him by the hospital, did nothing to try to protect himself against possible charges, such as securing sworn statements from the patients involved or from the secretary who allegedly was permitted to "assess" patients and who was and is now no longer in the petitioner's employ and cannot be located.

On May 12, 1987, two (2) days before the hearing, the petitioner's attorney was served with amended charges. The Board accepted the amended charges and proceeded upon these charges despite an obviously jurisdictional defect. Objection to these amended charges was made by defense counsel at the hearing, but same were accepted over his objection. A reading of the transcript indicates that the Board took a five (5) minute recess to read these amended charges. Presumably, the petitioner was afforded these very same five (5) minutes to prepare his defenses to these additional charges.

On May 13, 1987, petitioner's attorney, in an effort to provide a defense as well as to engage in reasonable cross-examination of witnesses produced by OPMC, served a subpoena signed by the Administrative Judge providing for

the production of various records. This subpoena apparently was not honored and counsel for petitioner, despite a protest to the Administrative Judge, was obliged to conduct his cross-examination of the witnesses without benefit of the documents deemed by him to be essential to conduct a meaningful cross-examination.

A subsequent subpoena was signed on July 13, 1987 which also was not honored. In the interim, to the total detriment and prejudice of the petitioner, the Administrative Judge compelled the petitioner to proceed with the hearings, which were conducted on May 14, 1987, June 4, 1987, and August 10, 1987.

From that point, this matter has been before this court as a result of court-ordered stays commencing with a motion on August 17, 1987, the first of several motions addressed to the petitioner's desire to obtain various records, including the petitioner's personnel file, pursuant to the Administrative Judge's subpoena. What followed was a series of what can only be characterized as games of "cat and mouse" wherein the records ordered to be [supplied] were in effect, only partially supplied.

At a hearing held on February 21, 1990, this court made several directions which were to be complied with immediately by respondent. A formal order was signed directing a turning over to petitioner's attorney any documents, minutes, and/or memoranda, which would aid the petitioner in his defense.

Throughout this time, this court did not understand the charges made against the petitioner, and the explanation given by respondent's attorney was something less than enlightening. This court, accordingly, directed respondent to serve upon the petitioner's attorney what it called a "bill of particulars" wherein respondent was to supply the petitioner with the basis for the charges being made.

In lieu of a bill of particulars, the court received a letter dated March 1, 1990 from the Attorney General's office, signed by one John J. O'Grady, which contains the following language:

> "Since the Health Department has rested its direct case on August 10, 1987, Dr. Doe has had complete discovery of all the evidence and all the testimony against him. He needs no Bill of Particulars. He has the Health Department's entire case. Your direction for a bill of particulars is unnecessary.
>
> Since the Health Department's direct case has been concluded, all the documentary evidence against the doctor is already a matter of record. There is nothing further for the Health Department to do to comply with your order."

A complete copy of the minutes of the Administrative Hearing were supplied by the Attorney General, and, with the [aforesaid] letter's implicit suggestion to so do, this court "searched the record" to ascertain whether the respondent's position re the bill of particulars was correct.

A reading of these minutes presented this court with a dilemma. This court is fully aware that the hearing was not completed, and that the court should not, under normal circumstances, interject itself into the administrative process until the petitioner exhausted his administrative remedies. Yet, by the language of the letter, this court was invited to read the minutes wherein the entire case against the petitioner was completed. Thus this court finds that the evidence presented by the prosecutor is insufficient, as a matter of law, to support the charges.

The purported case against petitioner is based on innuendo, improper opinion evidence, improper expert opinions based on supposition, and, not on facts in evidence,

improper curtailment of cross-examination, improper admission and/or exclusion of evidence and rulings which were incomprehensible to this court. In short, there was no actual proof of any wrongdoing by the petitioner.

When the State rested its case, a motion to dismiss was made by petitioner's counsel. The disposition of this motion by the Administrative Officer was:

> "At this point the motion to dismiss will not be entertained pursuant to the general practice of the Department that motions to dismiss at the end of the Department's case are not entertained."

This court has an uneasy feeling about this disposition. If such a rule does exist, it should be changed.

In any event, this court having been invited to "search the record," has done so, and now does what the Administrative Officer should have done upon completion of the [state's] case, and that is, grant the motion.

Accordingly, petitioner's motion to dismiss the complaint brought by the Office of Professional Medical Conduct is granted.

This constitutes the decision and judgment of this Court.

Dated: January 29, 1992

/s/

APPENDIX D

Decision and Order of the Appellate Division, First Department, Dated June 8, 1993, with Notice of Entry

Sullivan, J.F., Carro, Ellerin, Rubin, JJ.
48662

John Doe, M.D.,

Petitioner-Respondent,

-against-

St. Clare's Hospital and Health Center,
Respondent,

-and-

The Office of Professional Medical Conduct,
Respondent-Appellant.

Judgment, Supreme Court, New York County (Francis N. Pecora, J.), entered February 20, 1992, which granted petitioner's CPLR article 78 petition and dismissed the complaint in an administrative disciplinary proceeding brought by the Office of Professional Medical Conduct, unanimously reversed, on the law, without costs, the petition is dismissed, and the matter is remanded to the administrative agency for further proceedings.

In April 1987, charges of misconduct were served upon the petitioner, a physician, by the Office of Professional Medical Conduct (OPMC), a branch of the New York State Department of Health. An administrative hearing on the charges commenced on May 14, 1987. After presenting its witnesses and exhibits, the OPMC prosecution rested its case on August 10, 1987. On August 17, 1987, petitioner commenced a CPLR article 78 proceeding in Supreme Court

seeking to compel compliance with certain subpoenas and seeking a stay of further administrative proceedings pending compliance. Litigation continued around this compliance order, which was ultimately issued, until, in a decision dated February 27, 1990, the IAS court found "A reading of the specifications has convinced this court that the petitioner, 'John Doe' should be supplied with a bill of particulars of the proof which will be used to prove the specifications in the charge." By letter dated March 1, 1990, OPMC reminded the court that OPMC had rested its case in the administrative proceeding against petitioner and that, accordingly, petitioner had complete discovery of the case against him so that a bill of particulars was unneeded. The court refused to modify its order. On February 5, 1991, the petitioner served OPMC with a demand for a bill of particulars, the response to which incorporated the administrative record below.

On March 18, 1991, the petitioner moved to dismiss the charges before the OPMC hearing board on the grounds of "jurisdictional defects, laches and disregard for court orders." The IAS court, after reviewing the record of agency proceedings to determine whether there was sufficient compliance with its prior order to submit for a bill of particulars, found the evidence presented to be insufficient as a matter of law to support the charges against the petitioner and dismissed those charges. OPMC here appeals that dismissal.

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *(Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). "The doctrine of exhaustion of administrative remedies requires 'litigants to address their complaints initially to administrative tribunals, rather than to the courts, and * * * to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts'".

(Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375 [citation omitted]; *see also, Matter of Cortlandt Nursing Home v Axelrod,* 66 NY2d 169, 180, *cert denied* 476 US 1115).

Thus, absent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency. Here, the court erred in dismissing the complaint against the petitioner prior to final adjudication on an administrative level and, accordingly, the judgment granting petitioner's CPLR article 78 petition must be reversed and the matter remanded to the Office of Professional Medical Conduct for further proceedings.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Entered: June 8, 1993

/s/
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

JOHN DOE, M.D.,

Petitioner-Respondent, 48662

-against-

ST. CLARE'S HOSPITAL NOTICE

and HEALTH CENTER, OF ENTRY

Respondent,

-and-

THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT,

Respondent-Appellant.

PLEASE TAKE NOTICE that the within is a true and complete copy of a decision and order duly filed and entered in the office of the Clerk of the Court, Supreme Court of the State of New York, Appellate Division: First Department, on June 8, 1993.

Dated: New York, New York
June 28, 1993

Yours, etc.,
ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent-Appellant
120 Broadway
New York, New York 10271
(212) 416-8579

APPENDIX E

Report of Regents Review Committee
Dated February 19, 1996

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER
of the
Disciplinary Proceeding
against
NATHANIEL SHAFER

No. 15551

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

NATHANIEL SHAFER, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was properly commenced and on May 14, 1987, June 4, 1987, August 10, 1987, November 29, 1988, April 27, 1994, May 11, 1994, May 12, 1994, June 2, 1994, and June 24, 1994, a hearing was held before a hearing committee of the State Board for Professional Medical Conduct. A copy of the statement of charges and amended statement of charges are annexed hereto, made a part hereof, and marked as Exhibit "A".

The hearing Committee rendered a report of its findings, conclusions, and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "B".

The hearing committee concluded that respondent was guilty of subparagraph (i) of the third specification as to Patient A, subparagraph (ii) of the third specification, and the fourth specification as to Patients A and B, and was not guilty of the remaining specifications and charges. The hearing committee recommended that respondent be suspended for six months, assessed a $20,000 penalty (calculated by fining respondent $10,000 each for the third and fourth specifications), and required to take a course in ethics.

The Commissioner of Health, by his designee, recommended to the Board of Regents that the findings of fact and conclusions of the hearing committee be accepted, the recommendation of the hearing committee be modified, and the respondent be censured and reprimanded, fined $20,000 as recommended by the hearing committee, and be required to take a course on ethics related to medical practice. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "C".

On May 23, 1995, respondent appeared before us in person and was represented by his attorneys, Orin E. Agri, Esq. and Irving [Anolik], Esq., who presented oral argument on behalf of respondent. Silvia Finkelstein, Esq., presented oral argument on behalf of the Department of Health.

Petitioner's recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was that respondent's license be suspended for six months and respondent be fined $20,000 and required to take a course in ethics.

Respondent's recommendation as to the measure of discipline to be imposed, should respondent be found guilty,

was that any penalty should be limited to an admonition, however, all charges should be dismissed.

We have considered the record transferred to us by the Department of Health.

At oral argument before us, petitioner's attorney asserted that the hearing committee's rationale for the penalty it recommends is sound: and the rationale of the designee of the Health Commissioner for the penalty he recommends is not sound. Respondent's attorney explained that if we do not agree with his recommendation to dismiss all of the charges, an "admonition" for respondent not to repeat his prior conduct would be the maximum sanction warranted. Respondent's attorney contended that respondent was a "top notch citizen" and "an honorable physician" with an unblemished record.

Respondent's attorney indicated, at oral argument, that his "primary argument" is that the substitution of two members of the hearing committee was improper as a matter of law. We disagree. Nothing in Public Health Law §230(10)(f) requires the discontinuation of the hearing in the event of the substitution of two members. *Laverne v. Sobol,* 149 A.D.2d 758 (3rd Dept. 1989); and *Park v. Board of Regents of the University of the State of New York,* ___ A.D.2d ___ (3rd Dept. 1995). Respondent has not cited any authority to support his assertion that an "illegal hearing" was conducted in view of this substitution of hearing committee members.

We also reject respondent's further assertion that the hearing committee prematurely determined the issue of the credibility of witnesses before the completion of the hearing. We find such contention to be unsupported by the record. Respondent has failed to demonstrate that he suffered any actual harm or prejudice at the hearing or that the hearing

committee members were biased or prejudiced. *See, Nehorayoff v. Fernandez*, 91 A.D.2d 833 (3rd Dept. 1993).

We agree with and accept the hearing committee's assessments, shown on pages 13-15 of its report, as to the credibility of Patient A, Lydia Hochberg, and respondent.

In our unanimous opinion, respondent is guilty, by a preponderance of the evidence, of fraud as alleged in subparagraph (ii) of the third specification to the extent indicated hereinafter. As the hearing committee concluded, respondent "knowingly, and with intent to deceive, submitted a bill to the medical benefits carrier which falsely claimed that he had made follow-up hospital visits to Patient A" on January 21, 1983 and January 22, 1983. Hearing Committee report page 17. Accordingly, respondent, with fraudulent intent, falsely represented, in the bill for services he submitted, that he had conducted a total of ten follow-up hospital visits for Patient A between January 21, 1983 and January 30, 1983 when respondent, as he knew, did not visit Patient A on January 21, 1983 and January 22, 1983.

We do not sustain subparagraph (i) of the third specification. The hearing committee did not render any conclusion or findings establishing respondent's intent with respect to the hospital record for Patient A and for Patient B and, in spite thereof, the hearing committee sustained the fraud charges regarding Patient A, but not regarding Patient B. In both cases, the hearing committee found that respondent's progress notes for Patients A and B on certain dates are practically or almost identical and concluded that respondent was guilty of the record-keeping charge alleged in the fourth specification to the extent it relates to Patients A and B. Although we agree with the hearing committee's conclusions finding respondent guilty of the fourth specification to the extent it relates to Patients A and B, the mere fact that such

records were not accurately maintained does not establish the elements needed to prove fraud regarding the patients' hospital records. *Adler v. Bureau of Professional Medical Conduct, State of New York, Department of Health,* ___ A.D.2d ___, 622 N.Y.S.2d 609 (3rd Dept. 1995); and *Amarnick v. Sobol,* 173 A.D.2D 914 (3rd Dept. 1991).

With respect to the issue of penalty, we disagree with respondent's characterization that the misconduct we have determined is "minor". An "admonition", which is not a penalty enumerated in Education Law §6511, is, in our unanimous opinion, not warranted under these circumstances. Also not warranted as a penalty in this matter, is a Censure and Reprimand or a suspension of licensure.

In recommending a penalty to be imposed upon respondent, we have considered the entire record in this matter.

Respondent's professional misconduct was committed over four and one-half years before petitioner issued its statement of charges. Other than the relevant January 1983 incidents, petitioner has not shown any misconduct by respondent in his forty years of practice, including the eight years after these hearings began.

The charges brought against respondent included various allegations which have not been sustained by the hearing committee, designee of the Commissioner of Health, or us. Thus, respondent is not guilty of any permitting, aiding or abetting an unlicensed person to assess a patient and write progress notes (first specification); or any delegating of professional responsibilities to a person whom respondent knew or had reason to know was not qualified to perform them (second specification). Respondent is also not guilty of any fraud or record-keeping charges as to Patients C, D, E,

and F. Regarding all of the patients referred to in the charges, including the only patient who was the subject of the hearing committee's and designee's conclusion of fraud, respondent was found not guilty, at all levels of review, of the allegations that respondent made and/or caused to be made entries in the hospital records which falsely represented "the examination performed and/or by whom the examinations were performed". Moreover, the penalty to be imposed herein may not consider and is not based upon the allegations which we do not sustain in subparagraph (i) of the third specification.

We unanimously disagree with the recommendation to fine respondent $10,000 each on the third and fourth specifications, for a total fine of $20,000. We do not find a $20,000 fine based upon two consecutive $10,000 fines to be appropriate under the circumstances. Inasmuch as fraud (the third specification) is only established regarding Patient A, the maximum $10,000 fine permitted by law for the fraud committed by respondent is warranted in view of respondent's conduct of knowingly and with the intent to deceive the medical benefits carrier submitting for reimbursement a bill which makes false claims. On the other hand, no fraud was sustained regarding Patient B and no improper motive by respondent was found regarding the record-keeping charges sustained in the fourth specification. In our opinion, an additional maximum $10,000 fine is not warranted to be imposed upon respondent based upon respondent's guilt as to the fourth specification. Accordingly, we recommend that, under the circumstances, respondent be fined $10,000 concurrently on each of the third and fourth specifications, for a total fine of $10,000.

We note that respondent's attorney claimed, and petitioner's attorney did not dispute the claim, that respondent recently received an award for his humanitarian work for the homeless. We further note that no rationale was set forth by

either the hearing committee or the designee of the Commissioner of Health for imposing a $20,000 fine or for recommending consecutive fines. The designee did mention, however, that given the respondent's age, the time that has passed, and the misconduct by respondent, a six month actual suspension would "serve no purpose".

We unanimously recommend the following to the Board of Regents:

1. The hearing committee's findings of fact be accepted and the recommendation of the designee of the Commissioner of Health as to the hearing committee's findings of fact be accepted;

2. The following additional finding of fact, referrable to Patient A, be accepted:

   14A Respondent knowingly and with the intent to deceive Patient A's medical benefits carrier submitted such false bill to the medical benefits carrier.

3. The hearing committee's conclusions and the conclusions of the designee of the Commissioner of Health be accepted, except the conclusion of each as to subparagraph (i) of the third specification not be accepted;

4. Respondent is guilty, by a preponderance of the evidence, of fraud involving respondent knowingly, and with intent to deceive, submitting a bill for services he purportedly rendered to Patient A, which falsely claimed that he had conducted ten follow-up hospital visits for Patient A between January 21, 1983 and January 30, 1983 when respondent, as he knew, did not visit Patient A on January 21, 1983 and January 22, 1983 (subparagraph (ii) of the third specification); and unprofessional conduct pursuant

to 8 N.Y.C.R.R. §29.2(a)(3) involving respondent failing to maintain records which accurately reflect the evaluation and treatment of Patients A and B in that the progress notes for these patients are practically or almost identical and do not accurately reflect the condition of those patients on January 21, 22, 23 and 24 1983; and respondent is not guilty of the remaining specifications and charges;

5. The recommendations of the hearing committee and designee of the Commissioner of Health as to the measure of discipline be modified; and

6. Respondent be fined $10,000 upon each specification of the charges of which respondent has been found guilty, said fine to be imposed concurrently and to total $10,000, and to be paid by certified check to the order of the New York State Education Department and mailed to the Executive Director, Office of Professional Discipline, One Park Avenue - Sixth Floor, New York, New York 10016 within four months after the effective date of the service of the order to be issued in this matter.

EMLYN I. GRIFFITH
JANE M. BOLIN
JOHN T. McKENNAN
/s/
[Emlyn I. Griffith] Chairperson

Dated: 2/19/96

APPENDIX F

Vote and Order No. 15551 of the University of the State of New York Dated March 13, 1996, with Report of Regents Review Committee Dated February 19, 1996 (printed herein as Appendix E), **Cover Letter dated March 16, 1996, and a Copy of Rule 24.7(b) of the Rules of the Board of Regents**

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER
OF
NATHANIEL SHAFER
(Physician)

DUPLICATE ORIGINAL VOTE AND ORDER NO. 15551

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 15551, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (March 13, 1996): That, in the matter of NATHANIEL SHAFER, respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The hearing committee's findings of fact be accepted and the recommendation of the designee of the Commissioner of Health as to the hearing committee's findings of fact be accepted;

2. The following additional finding of fact, referrable to Patient A, be accepted:

14A Respondent knowingly and with the intent to deceive Patient A's medical benefits carrier submitted such false bill to the medical benefits carrier.

3. The hearing committee's conclusions and the conclusions of the designee of the Commissioner of Health be accepted, except the conclusion of each as to subparagraph (i) of the third specification not be accepted;

4. Respondent is guilty, by a preponderance of the evidence, of fraud involving respondent knowingly, and with intent to deceive, submitting a bill for services he purportedly rendered to Patient A, which falsely claimed that he had conducted ten follow-up hospital visits for Patient A between January 21, 1983 and January 30, 1983 when respondent, as he knew, did not visit Patient A on January 21, 1983 and January 22, 1983 (subparagraph (ii) of the third specification); and unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.2(a)(3) involving respondent failing to maintain records which accurately reflect the evaluation and treatment of Patients A and B in that the progress notes for these patients are practically or almost identical and do not accurately reflect the condition of those patients on January 21, 22, 23 and 24 1983; and respondent is not guilty of the remaining specifications and charges;

5. The recommendations of the hearing committee and designee of the Commissioner of Health as to the measure of discipline be modified; and

6. Respondent be fined $10,000 upon each specification of the charges of which respondent has been found guilty, said fine to be imposed concurrently and to total $10,000, and to be paid by certified check to the order of the New York State Education Department and mailed to the Executive Director, Office of Professional Discipline, One

Park Avenue - Sixth Floor, New York, New York 10016 within four months after the effective date of the service of the order to be issued in this matter;

and that the Acting Associate Commissioner for the Professions be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and *SO ORDERED,* and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Johanna Duncan-Poitier, Acting Associate Commissioner for the Professions, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand, at the City of Albany, this 13th day of March, 1996.

/s/
JOHANNA DUNCAN-POITIER
ACTING ASSOCIATE
COMMISSIONER FOR
THE PROFESSIONS

The State Education Department/The University of the State of New York/Albany, N.Y. 12234

Office of Professional Discipline
One Park Avenue, New York, New York 10016-5802

March 15, 1996

Nathaniel Shafer, Physician
10 East 85th Street
New York, New York 10028

Re: License No. 076953

Dear Dr. Shafer:

Enclosed please find Order No. 15551. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7(b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,
DANIEL J. KELLEHER
Director of Investigations
By:
GUSTAVE MARTINE

24.7 Review in other cases. The committee on the professions shall review and submit it recommendation to the Board of Regents for final determinations in the following cases:

(b) petitions for restoration of professional license which has been revoked or surrendered pursuant to Education Law, section 6510 or 6510-a. At least one year shall have elapsed from the date of service of the order of revocation, acceptance of surrender, or denial of a prior application for restoration or reinstatement by vote of the Board of Regents, for the acceptance by the department of a petition to the Board of Regents for restoration of a license or certificate, except that a period of time during which the license was suspended during the dependency of the discipline proceeding may reduce the one-year waiting period. This section shall not apply to restoration of licenses which have been temporarily surrendered pursuant to Education Law, section 6510-b, or Public Health Law, section 230(13).

(1) Materials submitted in response to the Committee on the Professions' recommendation to the Board of Regents shall be filed no later that 15 days following the postmarked date of the written notification of the decision or recommendation of the Committee on the Professions.

(2) If an applicant has failed to remain current with developments in the profession, and a substantial question is presented as to the applicant's current fitness to enter into active practice of the profession, the Board of Regents may require that the applicant take and obtain satisfactory grades on a proficiency examination satisfactory to the department prior to the issuance of a license or limited permit.

APPENDIX G

Memorandum & Judgment of the Supreme Court of the State of New York—Appellate Division, Third Department, Dated October 16, 1997

Supreme Court—Appellate Division
Third Judicial Department

Decided and Entered: October 16, 1997 76677

In the Matter of NATHANIEL SHAFER,

MEMORANDUM AND JUDGMENT

Petitioner,

v

BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondent.

Calendar Date: September 3, 1997

Before: Cardona, P.J., Mikoll, Mercure, Casey and Yesawich Jr., JJ.

Irving Anolik, New York City, for petitioner.
Dennis C. Vacco, Attorney-General (Lyssa M. Sampson of counsel), New York City, for respondent.

Mercure, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Public Health Law § 230-c[5]) to review a

determination of respondent which fined petitioner for professional misconduct in practicing medicine.

Petitioner is a physician licensed to practice medicine in New York. In this CPLR article 78 proceeding, he challenges respondent's determination finding him guilty of (1) fraud in submitting a bill falsely claiming that he conducted 10 follow-up hospital visits with patient A between January 21, 1983 and January 30, 1983 when, in fact, respondent did not visit patient A on January 21, 1983 and January 22, 1983, and (2) unprofessional conduct pursuant to 8 NYCRR 29.2(a)(3) for failing to maintain records which accurately reflected the evaluation and treatment of patient A and patient B, in that each patient's daily progress notes for the period from January 21, 1983 through January 24, 1983 were nearly identical to one another and did not accurately reflect the condition of the patient, and imposing concurrent fines of $10,000. We are not persuaded by petitioner's assertions of error and, accordingly, confirm the challenged disposition and dismiss the petition.

As a threshold matter, we disagree with petitioner's contention that the substitution of two members of the Hearing Committee of the State Board for Professional Medical Conduct during the pendency of the hearings on the charges against him deprived respondent of jurisdiction. We do not construe the provision of Public Health Law § 230(10)(f) that "[a] hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of *one member* of the hearing committee" (emphasis supplied) as requiring discontinuation of the hearing in the event of the death or incapacity of more than one member. To the contrary, in *Matter of Laverne v. Sobol* (149 AD2d 758, 760, *lv denied* 74 NY2d 610) this court interpreted the very same language, then contained in Education Law § 6510(3)(c), as permitting the replacement of two members of a hearing panel *(accord, Matter of Briggs v Board of Regents of Univ. of State of*

N.Y., 188 AD2d 836, 837, *lv denied* 81 NY2d 708). The more appropriate inquiry is whether the substitute committee members "ha[d] read and considered evidence and transcripts of the prior proceedings" (Public Health Law § 230[10][f]) and made an informed decision on all of the hearing evidence *(see, Matter of Taub v. Pirnie,* 3 NY2d 188, 194-195; *Matter of Briggs v. Board of Regents of Univ. of State of N.Y., supra,* at 837), requirements that the record shows to have been satisfied in this case.

Next, we reject petitioner's attack on the sufficiency of the evidence to support the finding that petitioner did not visit patient A on January 21, 1983 or January 22, 1983. Catherine Graham, the head nurse on patient A's floor at the time of his hospitalization, testified that she first saw patient A on January 22, 1983, at which time she talked with him and asked him whether he was experiencing any headache, dizziness, numbness or pain. According to Graham, patient A "appeared kind of healthy for somebody in the hospital" and denied any of those symptoms. Graham saw patient A the following day and he continued to deny any problems. When she examined his chart to determine petitioner's plans for the patient, she discovered that there had been no physician's progress notes from the time of patient A's January 20, 1983 admission. Later that day, however, Graham found that progress notes had been entered for four different dates, but the notes were unsigned and there was no patient name on the top of the chart to indicate that it was the correct chart. Graham asked patient A if his doctor had been in to see him that day, and patient A responded that his doctor had not seen him since the day he was admitted.

Yet later on January 23, 1983, an unfamiliar woman asked Graham for patient A's chart. When asked to identify herself the woman stated that she was petitioner's "assistant", and upon inquiry by Graham acknowledged that she had entered

the unsigned progress notes in patient A's chart. Graham then challenged the woman's authority, indicating that she should not be looking at patient A's records, and demanded the return of the chart. Within five minutes, petitioner appeared at the nurses' station and explained that the woman was his assistant and that she had seen and assessed patient A. Petitioner then signed the progress notes, made additional written notations and changed the date of the fourth entry from January 24, 1983 to January 23, 1983. Graham noted that the progress notes for each of the four days were "very, very similar" and the documentation of headaches, dizziness, drowsiness and pain directly contradicted patient A's denials of the very same symptoms. Graham promptly notified her supervisor of the foregoing occurrences, wrote a memo to the assistant director of nursing and also advised the quality assurance department.

This court's review is, of course, limited to the question of whether respondent's determination was arbitrary and capricious, affected by an error of law or an abuse of discretion; as such, "our inquiry is whether the administrative determination has a rational basis supported by fact" *(Matter of Brown v. New York State Dept. of Health,* ___AD2d___, ___, 652 NYS2d 860, 862, *lv denied* 89 NY2d 814). In making this inquiry, we will not decide credibility issues, resolution of which are solely within the province of the administrative fact finder *(see, id.,* at 862). Clearly, Graham's testimony provided sufficient evidentiary support for the finding that petitioner did not see patient A on January 21, 1983 and January 22, 1983, a fact that is unaffected by the existence of contrary testimony by petitioner, Lydia Hochberg (the individual identified as petitioner's assistant) and even by patient A, all of whom the Hearing Committee specifically determined were not credible witnesses *(see, id.; Matter of Adler v. Bureau of Professional Med. Conduct, State of New York, Dept. of Health,* 211 AD2d 990).

Petitioner's remaining contentions are found to be either lacking in merit or unsupported by the record.

Cardona, P.J., Mikoll, Casey and Yesawich Jr., JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

/s/
Michael J. Novack
Clerk of the Court

APPENDIX H

Decision and Order on Motion of the Supreme Court of the State of New York Appellate Division, Third Department, Dated January 27, 1998

Supreme Court—Appellate Division
Third Judicial Department

Decided and Entered: January 27, 1998 Case #: 76677

In the Matter of NATHANIEL SHAFER,

Petitioner,

v

BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondent.

DECISION AND ORDER ON MOTION

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion, and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

CARDONA, P.J., MIKOLL, MERCURE AND YESAWICH JR., JJ., concur.

ENTER:

/s/
Michael J. Novack
Clerk of the Court

APPENDIX I

Decision and Order on Motion of the Supreme Court of the State of New York—Appellate Division, Third Department, Dated May 28, 1998

Supreme Court—Appellate Division
Third Judicial Department

Decided and Entered: May 28, 1998 Case #: 76677

In the Matter of NATHANIEL SHAFER,
Petitioner,
v
BOARD OF REGENTS OF THE STATE OF NEW YORK,
Respondent.

DECISION AND ORDER ON MOTION

Motion for rehearing and reargument.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

CARDONA, P.J., MIKOLL, MERCURE AND YESAWICH JR., JJ., concur.

ENTER:

/s/
Michael J. Novack
Clerk of the Court

APPENDIX J

New York State Education Law §6510(d)

Service of charges and of notice of hearing. A copy of the charges and notice of any hearing pursuant to subdivision two or three of this section shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by certified mail, return receipt requested to the licensee's last known address by the department at least twenty days before the hearing.

APPENDIX K

New York State Public Health Law §§230(10)(d) and (f)

(d) Service of charges and of notice of hearing. A copy of the charges and the notice of the hearing shall be served on the licensee personally by the board at least twenty days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered or certified mail to the licensee's last known address by the board at least fifteen days before the hearing.

(f) Conduct of hearing. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision). The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairman of the board. The member shall affirm in writing that he has read and considered evidence and transcripts of the prior proceedings.